IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 29, 2006 Session

JEFFREY TODD RADEBAUGH v. DORIS RADEBAUGH

Appeal from the Circuit Court for Davidson County
No. 04 D 2416 Carol Solomon, Judge

No. M2005-02727-COA-R3-CV - Filed on October 26, 2006

The trial court granted Doris Radebaugh ("Wife") a divorce from Jeffrey Todd Radebaugh ("Husband"), and designated Wife as the primary residential parent of the parties' minor son. The court stated from the bench that Husband was "one of the most disgusting humans [it] [had] ever met" and opined that, if the court "had a magic wand," it "probably would make [Husband] disappear." Even though, just prior to the hearing below, Wife filed a proposed parenting plan providing for relatively standard visitation for Husband, the court limited Husband's regular visitation, *i.e.*, non-holiday/vacation time, to one 24-hour period every other week. Husband was ordered to pay child support. The trial court also classified and divided the parties' property and awarded Wife attorney's fees in the form of alimony *in solido* in addition to rehabilitative alimony. Husband appeals, challenging the trial court's decrees with respect to visitation, child support, property classification and division, allocation of the marital debt, and alimony. We reverse in part, vacate in part, and affirm in part. We direct that, on remand, this case is to be transferred to another judge who will dispose of all pending and future matters.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed in Part; Vacated in Part; Affirmed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Dana C. McLendon, III, Franklin, Tennessee, for the appellant, Jeffrey Todd Radebaugh.

Penny Harrington, Nashville, Tennessee, for the appellee, Doris Radebaugh.

OPINION

I.

Husband and Wife were married in 1995. They have one child, a son who was born in 1998. Wife, who is of Colombian descent, has a daughter from a previous relationship. At the time of trial, the parties' son was seven, and Wife's daughter, Tatiana Suarez Pico, was 24.

The trial court rendered its opinion from the bench. In its final judgment, the court made the following findings and conclusions:

> . . . [T]he Court finds that Husband is not a credible witness and that his testimony contained misstatements and untruths and, further, that Husband is guilty of Inappropriate Marital Conduct through his physical, mental, and emotional violence against Wife. The Court further finds that the Wife, Doris Radebaugh, is awarded an absolute divorce from the Husband, Jeffery [sic] Todd Radebaugh, on the ground of Adultery and Inappropriate Marital Conduct.
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> The Court further finds that Wife and the Wife's daughter, Tatiana Pico, are very credible witnesses as to Husband's propensity for control, cruelty and violence and mistreatment of Wife. The Court further finds that Husband has abused the minor child by his outbursts of physical and psychological violence in the presence of the child and by his instructing the child to act in ways similar to Father. The Court further finds that the Order of Protection currently in full force and effect should be extended for a period of one (1) year.[1] The Court further finds that the Husband has made racial, ethnic derogatory remarks to and about Wife in the presence of the child. The Court finds that Husband refuses to communicate with Wife about matters relating to the child's well being. Husband is ordered not to make racial, ethnic derogatory remarks to or about Wife at any time and especially in the presence of the child. The Court further finds that it is in the child's best interest that Wife be made the primary residential and custodial parent of the parties' minor child, and she should be the parent solely responsible for making all decisions regarding the child's education, extracurricular activities, religion, and health. The Court further finds that Husband's visitation with the minor child shall be limited pending his completion of two years of counseling with a therapist for his control, violence and angry outbursts. The Court further finds that the child may be in need

[1] The court entered an order of protection in this matter on September 29, 2004. At that time, the court granted Husband visitation with his son on an alternating weekend schedule.

> of continued therapeutic counseling as a result of the violence and anger that he has witnessed in the marital home.
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> The Court further finds that Husband is self employed and that his annual gross income is $135,000 to $140,000 per year. Therefore, after expenses of 30 to 40 per cent, his annual income is $80,000 to $85,000. The Court finds Husband's testimony that due to the calculations of his CPA, who is also his brother, that he has little or no income after expenses is not credible and further finds that the above-amount is his income[2] for purposes of calculation of Husband's share of martial [sic] debt and his share of child support pursuant to the Tennessee Child Support Guideline, and he shall pay $979 per month.
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> The Court further finds that Husband is able to pay and Wife needs rehabilitative alimony for a period of twenty-four (24) months during which time she will complete the Master's Degree in education which is [sic] she is currently pursuing which will enable her to receive a teacher's certificate from the State of Tennessee and continue her employment with the Board of Education of Nashville-Davidson County Metropolitan Government.
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> The Court finds that the $14,000 in the account that is shared by Wife and her daughter is not marital funds as it is the proceeds from the sale of real property in Colombia, S.A., which is their former country of residence, and which was titled under Colombian law in the name of the daughter as proved by attested documents from the court in Colombia exhibited and translated during the trial of this cause.
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> * * *
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> The Court finds that Wife is entitled to an award of alimony *in solido* for her attorney's fees and costs in the amount of $7,471.95 as a judgment for which execution may issue and which may be deducted from Husband's portion of the equity in the marital home[.]

The court also ordered Husband to pay the parties' two credit card bills. It directed Wife to pay the hospital bill associated with the birth of the parties' child. Finally, the court incorporated into its final judgment a permanent parenting plan, which severely limited Husband's visitation with the parties' child.

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[2] Later in the judgment, the court stated that Husband shall pay $979 per month in child support based upon an annual income of approximately $82,500.

II.

Husband appeals and raises the following issues:

> 1. Does the evidence preponderate against the trial court's visitation decree.
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> 2. Does the evidence preponderate against the trial court's determination of Husband's income for child support purposes.
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> 3. Does the evidence preponderate against the trial court's classification of property and allocation of marital debt.
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> 4. Does the evidence preponderate against the trial court's award of rehabilitative alimony and its award of alimony *in solido*.

III.

A.

Our review of the trial court's findings of fact is *de novo* upon the record of the proceedings below, which comes to us accompanied by a presumption of correctness, a presumption we must honor unless the preponderance of the evidence is against those findings. Tenn. R. App. P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). There is no presumption of correctness as to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

B.

A trial court has broad discretion in determining the details of custody and visitation. ***Suttles v. Suttles***, 748 S.W.2d 427, 429 (Tenn. 1988). It has the same broad discretion with respect to fashioning the division of the marital estate. ***Fisher v. Fisher***, 648 S.W.2d 244, 246 (Tenn. 1983); ***Barnhill v. Barnhill***, 826 S.W.2d 443, 449-50 (Tenn. Ct. App. 1991). A trial court is also vested with wide discretion in making an award of alimony. ***Aaron v. Aaron***, 909 S.W.2d 408, 410 (Tenn. 1995); ***Anderton v. Anderton***, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998).

In evaluating whether a trial court has abused its discretion, we are bound by the principle that the court "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000) and ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000)). A trial court abuses its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999) (citation omitted). In the absence of an abuse of discretion, an

appellate court cannot substitute its judgment for that of the trial court. ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998).

IV.

In general terms, Husband's first and primary issue asserts that the trial court erred with respect to both custody and visitation. However, in the argument section of his brief, Husband does not complain about Wife being designated as the child's primary residential custodian. Instead, he focuses on the court's restriction of his visitation rights. Husband contends that the trial court abused its discretion in making a visitation decision that was not in the best interest of the child. Specifically, Husband maintains that the court concentrated solely on the allegations of spousal abuse raised by Wife and her daughter and thereby failed to properly consider all applicable statutory factors.

In the comments following the conclusion of the proof, the court said the following:

> The thing that concerns me most is the violent nature of this man and this boy, this little boy. I don't want him to grow up like his father. I find it appalling. I believe the daughter, Ms. Pico. I think she was a very credible witness. And it is just absolutely – it made me cringe, it made me sick. Now if this man thinks he is a good father, he needs to have his head examined, which is not a bad idea. The domestic violence I sent him to could not touch the situation. He needs about three years of therapy in order to learn to let go of control. He has an abnormal need to control every aspect of people's lives.
>
> And his wife put up with torture, and his stepdaughter put up with torture. I can't imagine being pregnant, and he did not deny this, and maybe it is because I have had four children and understand the urgency to go to the bathroom when you are pregnant. And a husband that's so cruel that he won't stop at a gas station to go to the bathroom. It makes me so thankful that there are not many people like you, Mr. Radebaugh. There are not many men like you, there are not many women like you. I'm glad you are rare, because you are a cruel person.
>
> And for that reason I'm really concerned about the amount of time the father spends with the son. I gave him way too much in the temporary order, and in the Order of Protection. The Order of Protection by the way is extended for a year. And there are permanent restraining orders from keeping the father from harassing the mother in any way, by phone or in person. I'm really concerned about the lack of Mr. Radebaugh to talk to Ms. Radebaugh. I listened

to the telephone conversation that Ms. Radebaugh submitted, and what it showed me is a man when he didn't get his way or didn't have control or to exhibit more control, would hang up. "No communication is necessary. That is the way it always was."

Well, that tells me he can never share in the custody of this child. Originally I thought he was a good enough father to get the same time or more time than I originally granted him, but I was very, very, very wrong. And I am sorry to this child, and I hope I have not given him an example to follow with the time that I have allowed him to be with his father.

The father will have – mother will have sole and complete custody, sole decision making power over education, extracurricular activities, religion, health. I'm going to give father minimum time that I can until he completes two years of counseling with a therapist. With his – I don't care who it is, it can be AA, it can be whatever, he needs to learn that he does not control other people. And I don't want him to impart this to his child.

* * *

There is going to be an admonition, an order that he never say anything bad about this child's mother or about her heritage. Apparently he didn't realize the child is half Columbian [sic] and half American. I don't how [sic] you would not know it, so that when you call her a derogatory name, an immigrant or a Columbian [sic], the child internalizes that. And I find it appalling and I find it – and by the way, there is also going to be an order in there that he use no racial slurs against any race or ethnic group when the child is present. Whoever he wants to desecrate when he is with his friends or his family or whoever else other than his son, I don't care. But there will be no racial or ethnic slurs while his son is present. And if I find that the son comes out with bad statements about his mother, or ethnic or racial slurs, I will limit his time more severely than I have.

Now in figuring the child support, therefore you must figure he does not have the normal amount of time with the child. After two years, even after a year if I have a favorable report from a psychologist I will consider giving him standard time. But I think he is an abuser. I have observed Ms. Radebaugh and she exhibits all of the symptoms of an abused woman. I think he is a control maniac, and I think he is a racist.

* * *

> Mr. Radebaugh, if I had a magic wand – I don't know. I really don't know. I think I probably would make you disappear. You are one of the most disgusting humans I have ever met. I wish I could make you well, and hopefully or at least change your attitude. And maybe in a year or two years in therapy will be such that you can be part of your child's life. You are not allowed to go to a ballgame when the mother has the child unless the mother calls and ask [sic] you. You may communicate only about visitation, and you are to be very nice. And the reason why is because you are an overbearing control freak, and you would make that mother uncomfortable so that she could not go to her child's ballgames. You are rude to her on the telephone, and you are not to hang-up on her. You are not to cuss her, you are not to scream.

Pursuant to these remarks, the court in its final judgment severely limited Husband's time with his child. First, Husband was ordered to complete two years of counseling with a psychologist/therapist for anger management. During this period of therapy, the court permitted Husband to have the following restricted visitation with his son: one 24-hour period every other week; alternate holidays; three days/four days split in June and July and three days in August; Thanksgiving 2005 and successive odd-numbered years; and Christmas 2005 for three days. The court also decreed visitation for Christmas 2006 for one week, provided Husband received a favorable report from the therapist after one year of therapy. The court said it would consider giving Husband standard visitation if reports demonstrated improved social functioning after his first year of therapy.

In reviewing child custody and visitation cases, we must be mindful that the "welfare of the child has always been the paramount consideration." ***Suttles***, 748 S.W.2d at 429 (citation omitted). As recognized by the Supreme Court in ***Suttles***,

> . . . the right of the noncustodial parent to reasonable visitation is clearly favored. Nevertheless, "the right of visitation . . . may be limited, or eliminated, if there is definite evidence that to permit . . . the right would jeopardize the child, in either a physical or moral sense."

Id. (citations omitted).

With respect to establishing reasonable visitation, this Court has explained that "[v]isitation enables noncustodial parents to develop and maintain their relationships with their children." ***Yeager v. Yeager***, No. 90D-2743, 1995 WL 422470, at *4 (Tenn. Ct. App. M.S., filed July 19, 1995).

Furthermore, "courts cannot ignore noncustodial parents and must be sensitive to the effect that their decisions will have on the relationship between noncustodial parents and their children." ***Id.***

The primary goal of courts is to "promote [the child's] best interests by placing them in an environment that will best serve their physical and emotional needs." ***Gaskill v. Gaskill***, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996). There are no hard and fast rules for determining that a child's needs would best be served by a particular custody and visitation arrangement. ***Id.*** Rather, the trial court must engage in a factually-driven inquiry and carefully balance numerous considerations. ***Id.***

In fashioning a permanent parenting plan, a court must consider the factors set forth in T.C.A. § 36-6-404(b) (2005). These factors provide a basis for determining a residential schedule that "encourage[s] each parent to maintain a loving, stable, and nurturing relationship with the child." ***Id.*** The factors are as follows:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
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> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
>
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
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> (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
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> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
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> (6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
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> (7) The love, affection, and emotional ties existing between each parent and the child;
>
> (8) The emotional needs and developmental level of the child;

> (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
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> (10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
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> (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
>
> (12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;
>
> (13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
>
> (14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
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> (15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
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> (16) Any other factors deemed relevant by the court.

T.C.A. § 36-6-404(b)(1)-(16).

Needless to say, all parents are human beings with various virtues and vices and therefore they cannot be measured against the standard of perfection. ***Gaskill***, 936 S.W.2d at 630. Trial courts are cautioned to never use custody and visitation arrangements to punish or reward a parent. ***See id.*** Moreover, "[r]ather than calling for heavy handed, authoritarian intervention, [custody and visitation decisions] require trial courts to exercise compassionate and practical judgment to devise an arrangement that will promote the continuation and development of the child's relationship with both parents." ***Wix v. Wix***, No. M2000-00230-COA-R3-CV, 2001 WL 219700, at *9 (Tenn. Ct. App. M.S., filed March 7, 2001).

For the most part, the trial court did not find Husband to be a credible witness. The credibility of witnesses is a matter that is peculiarly within the province of the trial court, *see* ***Bowman v. Bowman***, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991), and, therefore, determinations regarding witness credibility are entitled to great weight on appeal. *See, e.g.*, ***Massengale v.***

Massengale, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995). Accordingly, we will not consider Husband's testimony but, instead, will focus on the testimony of the other witnesses on this issue.

As a part of his proof, Husband called two witnesses who painted a very positive image of the relationship between Husband and the child. Virginia Mena runs the daycare program in which the parties' child was enrolled in 2002 to 2004. Ms. Mena recalled that it was usually Husband who would bring the child to daycare in the morning and pick him up in the afternoon. Based on her observations, the child was always happy to see his father in the afternoons and would run and jump in his arms. Ms. Mena also noted that Husband was the parent who would normally pick up the child if the daycare called to say he was sick. In addition, she stated that Husband always brought the child to daycare clean, fixed his food for him, and would bring in special treats for the kids and teachers on occasion.

Susan Davenport, the child's first grade teacher, also testified about her observations of Husband's relationship with the child. When Husband dropped off and picked up the child at school, Ms. Davenport noticed that the child always seemed very happy to be with his father. In addition, she testified that the child seemed to miss his father a lot during the time when Husband was not permitted to see him. Moreover, Ms. Davenport stated that the child would regularly go to the before-care and after-care programs at school when he was not staying with his father. Finally, she reported that, for a couple of weeks last fall, the child was getting into trouble and not being as respectful as he had been, but that the situation was not out of the ordinary for a first grader. Ms. Davenport reported that the child, who speaks both English and Spanish fluently, is considered gifted and has always been an excellent student.

Tatiana Suarez Pico was called as a witness by her mother. Ms. Pico lived with the parties on a part-time basis during summer and holiday breaks from school. According to her, Husband would call Wife obscene names in front of the minor child. She also told of the story when Husband threw a plate of food against the wall near where the child – who was three at the time – was sitting, because he did not like the food that Wife had prepared. Ms. Pico described the relationship between Husband and the child as "hot and cold." On a good day, Husband would take the child to the park or take him hunting or fishing. If the child was tired and cranky, however, Husband "would get violent and [would] tell him to go in his room or to shut the f_ _ _ up" or "to get the h_ _ _ out." Ms. Pico also stated that Husband would spank the child by pulling his pants down. Ms. Pico explained that she was struck in the face by Husband while her mother and the minor child were watching. Finally, Ms. Pico observed that the child was around when Husband would abuse alcohol. According to Ms. Pico, the child has been disrespectful to his mother by hitting her or calling her a "b_ _ _ _," both of which he saw his father do to his mother.

Wife testified that Husband was abusive to her in many ways both while she was pregnant with their son and after he was born. She told how Husband grabbed her by the hair, pulled her down to the ground, kicked her, pushed her against the wall and said, "I'm going to tear the scalp off your head, I'm going to smash your head against the wall." The parties' son, who was two at the time, was being held by his mother just prior to this incident. She also told about an incident on June

3, 2003, when Husband would not allow her to feed their son, said the child had to go to bed right away, and then started breaking and kicking things in the house. Wife grabbed her son and called the police regarding this incident. The record also contains an affidavit that Wife completed in support of her petition for an order of protection on September 9, 2004, in which she described an incident where Husband cursed her while she was trying to treat her son's injured knees and would not allow her to feed him when he was hungry and thirsty. Following this incident, Wife waited for her son to fall asleep in the house and then left to go to the police department. During her testimony, Wife asked that the order of protection be extended for another year because she is still afraid of him.

With respect to visitation, Wife testified that Husband should be allowed to spend every other weekend with their son. In fact, Wife filed a proposed permanent parenting plan on September 19, 2005, which was the first day of the hearing. We have excerpted her proposal, and it is attached as an appendix to this opinion. As can be seen, and consistent with her testimony, Wife suggested extensive visitation between Husband and the child.

We have carefully reviewed the evidence presented, balanced the statutory factors, and considered the law with respect to noncustodial parents. As we must, our analysis has been guided by the best interest of the parties' minor child.

The testimony of the two disinterested witnesses is compelling. Both Ms. Mena and Ms. Davenport, who knew the child well based upon their daily experiences with him, testified that the child was very happy to be with his father, who regularly took care of the child's needs at school. Ms. Davenport even stated that the child missed his father during the time he was not permitted to see him. This proof tends to show that Husband and his son enjoy a close relationship and that the child demonstrates no fear of his father. Ms. Davenport also reported that the child is a gifted student and that any behavior problems were not out of the ordinary for a first grader. Such evidence suggests that the child is functioning well.

There is nothing in the record to indicate that Husband ever directly abused the child. *See* ***Suttles***, 748 S.W.2d at 429 (in order to limit or eliminate reasonable visitation with a noncustodial parent, there must be definite evidence that such visitation would jeopardize the child in a physical or moral sense). Indeed, Wife testified and memorialized in her proposed permanent parenting plan that Husband should be allowed to spend every other weekend with their son. Although Wife is still fearful of Husband, she clearly believes that it is appropriate for her son to maintain substantial contact with his father. She did not testify as to any fear regarding her son being with his father.

Much of the negative testimony regarding Husband vis-a-vis his son pertained to inappropriate conduct and language which was directed, for the most part, at Wife, but in the child's presence. Such conduct and language does not represent the type of example that a father should project to his son. However, the context of this inappropriate behavior, *i.e.*, a subsisting marriage, no longer exist. Hopefully, with anger management training, Husband will demonstrate on a full time basis the exemplary conduct witnessed by Ms. Mena and Ms. Davenport.

Considering all of the evidence, we conclude that the evidence preponderates against the court's severe restriction of Husband's time with his son. The evidence favors a finding that Husband and the child should share a more normal relationship than that carved out by the court. The court's intemperate comments strongly suggest that the court was using lack of visitation as a punishment for Husband's conduct toward Wife. *See* ***Gaskill***, 936 S.W.2d at 630 (trial court must never use visitation arrangements to punish a parent). As mean and cruel as that conduct was, it does not form the basis for a punitive restriction of visitation.

There is an overwhelming abundance of evidence supporting the trial court's decision to award Wife the divorce. Husband is clearly in need of the anger management ordered by the trial court. We affirm that portion of the trial court's judgment. We emphasize the trial court's decree that Husband is enjoined from making derogatory remarks regarding Wife in the presence of the child. On the contrary, Husband should do everything in his power to foster the child's love and respect for his mother. The marriage is obviously broken beyond repair; but this fact should not - must not - affect the child's relationship with each of his parents.

We reverse the court's final judgment with respect to Husband's visitation rights. We hold that the visitation for Husband outlined in Wife's proposed parenting plan, an appendix to this opinion, is the appropriate amount of visitation in this case.

V.

Next, Husband, who is self-employed in the construction business, contends that the trial court's determination of his income for child support purposes was arbitrary and completely unsupported by the evidence.

The court made the following comments on this issue at the conclusion of the trial:

> I find Mr. Radebaugh is not a truthful witness. When he raised his hand to testify, I did not know that there would be so many misstatements and untruths that were going to come out. I had to discredit most of his testimony, and it was a difficult time determining what part was real and what was not, starting with the income. This man grosses somewhere around $135,000 to $140,000 a year and comes out with zero or minus. I don't believe all of his living expenses are funneled through the business. And his brother makes up and takes care of what documents are necessary, and that is how they come out with so little.
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> However, I find that in averaging what he grosses and taking out 30 or 40 percent for expenses which is normal, reasonable, he still makes

> 80 to $85,000 a year, and that's what I'm basing his child support and his ability to pay what debts I'm giving him.

In the final judgment, the court specified that Husband would pay $979 per month in child support based on an annual net income of $82,500.

T.C.A. § 36-5-101(e)(1)(A) provides that the trial court shall apply the Child Support Guidelines ("the Guidelines") as a rebuttable presumption in determining the amount of child support. On January 18, 2005, the new Guidelines, known as the "Income Shares Model," went into effect in Tennessee. *See* Tenn. Comp. R. & Regs., ch. 1240-2-4-.01 *et seq.* This model "presumes that both parents contribute to the financial support of the child in pro rata proportion to the actual income available to each parent." Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(1)(a).

In determining the gross income of each parent, the Guidelines state that all income from any source, including income from self-employment, will be considered. Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)1.(iv). The Guidelines define self-employment income as "income from, but not limited to, business operations, work as an independent contractor or consultant, sales of goods or services, and rental properties, etc." Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)3.(i).

The gross income of a self-employed individual, such as Husband in this case, must be reduced by "ordinary and reasonable expenses necessary to produce such income." Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)3.(i). The Guidelines prescribe that the following items will not be considered reasonable expenses: "excessive promotional, excessive travel, excessive car expenses or excessive personal expenses, or depreciation on equipment, the cost of operation of home offices, etc.," as well as "[a]mounts allowed by the Internal Revenue Service for accelerated depreciation or investment tax credits." Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)3.(ii)(I) and (II). Once reasonable expenses have been subtracted, a further adjustment must be made for the significant matter of federal income taxes. *See* Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(4).

The goals of the Guidelines are best met when current and accurate information of a parent's income is used. *See* ***Tinsley v. Tinsley***, No. M2001-02319-COA-R3-CV, 2002 WL 31443210, at *3 (Tenn. Ct. App. M.S., filed Nov. 1, 2002). In fact, there is a long established common law rule requiring a parent to provide child support "in a manner commensurate with his means and station in life." ***Nash v. Mulle***, 846 S.W.2d 803, 805 (Tenn. 1993) (citation omitted).

Husband testified regarding his income and expenses. We would again emphasize, however, that the trial court did not believe "most" of Husband's testimony. Because, as previously noted by us in this opinion, the issue of witness credibility is peculiarly within the province of the trial court, *see* ***Bowman***, 836 S.W.2d at 567, ***Massengale***, 915 S.W.2d at 819, we will focus on the independent, documentary evidence regarding Husband's income.

The record before us contains the parties' federal income tax returns for 2001, 2002, and 2003. At the time of trial in September, 2005, Husband had not yet filed his income tax return for

2004, but he provided testimony about his income for that year. Of course, Husband could only provide testimony regarding his 2005 income through September of that year. The tax returns introduced into evidence reveal the following: for 2001, Husband's gross receipts were $133,689 with a net loss of $7,910; for 2002, Husband's gross receipts were $139,354 with a net profit of $2,131; for 2003, Husband's gross receipts were $102,550 with a net profit of $12,813. All of the returns reflect deductions for the non-cash expense of depreciation. Therefore, according to the tax returns, Husband's business expenses for these years were substantial.

As argued by Husband, the trial court used the best year of Husband's gross receipts when it found that he earns a gross income of "somewhere around $135,000 and $140,000 a year." According to Husband, the court then totally disregarded his actual expenses and instead arbitrarily found an expense rate of 30 or 40 percent to be "normal, reasonable." Based on this analysis, the court concluded that Husband "makes 80 to $85,000 a year." We agree that the court erred in determining Husband's income for purposes of determining child support. Certainly, the trial court was at liberty to disregard Husband's testimony if it did not find that testimony to be credible; but such a determination does not permit the trial court to make a finding as to Husband's "normal, reasonable" expense rate in the total absence of any evidence to support such a finding.

Tennessee courts have acknowledged the difficulty in calculating income for a self-employed individual for child support purposes. The Supreme Court has noted:

> The[] self-employment guidelines[3] are fashioned in such a way as to authorize the trial court to address the potential of a self-employed obligor to manipulate income for the purpose of avoiding payment of child support. Courts have recognized that a self-employed obligor has the opportunity "'to manipulate his reported income by either failing to aggressively solicit business or by inflating his expenses, thereby minimizing his income.'" Based on this reasoning, in certain situations, a court may impute income to a sole owner of a business.

Taylor v. Fezell, 158 S.W.3d 352, 358 (Tenn. 2005) (citations omitted); *see also* ***Koch v. Koch***, 874 S.W.2d 571, 578 (Tenn. Ct. App. 1993); ***Sandusky v. Sandusky***, No. 01A01-9808-CH-00416, 1999 WL 734531, at *4 (Tenn. Ct. App. M.S., filed Sept. 22, 1999); ***Beem v. Beem***, No. 02A01-9511-CV-00252, 1996 WL 636491, at *4 (Tenn. Ct. App. W.S., filed Nov. 5, 1996) (all three cases recognizing the same difficulty).

While we sympathize with the trial court's struggle to determine an appropriate income figure upon which to base child support, where Husband is self-employed and admittedly had trouble

[3] It should be noted that the Supreme Court was referring to the Child Support Guidelines in effect when the events referred to in that case took place. Although the previous Guidelines were based on a model of a flat percentage of income, the Supreme Court's statement regarding self-employed individuals is still applicable under Tennessee's newly adopted Guidelines.

explaining various income figures, we find that the court's determination of Husband's income lacks a sufficient evidentiary foundation. *See* ***State ex rel. Vaughn v. Kaatrude***, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000) (although determining child support is a discretionary decision, it may be set aside "if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law"). Specifically, we cannot find any evidence in the record to support the court's determination that Husband's reasonable business expenses were 30 to 40 percent or that Husband has the ability to currently earn a net income of between $80,000 and $85,000 per year.

Accordingly, we vacate the trial court's award of child support and remand this case for further findings with regard to Husband's gross income, which should be re-calculated from reliable information relating to his gross receipts and reasonable business expenses. On remand, the court should be guided by the principles with regard to self-employment income and expenses as reflected in this opinion and other appellate court opinions. Ultimately, the court must determine the appropriate amount of child support as dictated by the entirety of the Guidelines.

VI.

A.

Husband next contends that the trial court erroneously classified certain property as separate instead of marital property. He further asserts that the court unfairly allocated the parties' marital debt. We disagree with Husband's two issues regarding the parties' marital estate. We will address each in turn.

B.

T.C.A. § 36-4-121(a)(1) directs the trial court to "equitably divide . . . the marital property between the parties . . . in proportions as the court deems just." As explained by this Court in ***Batson v. Batson***, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988),

> an equitable property division is not necessarily an equal one. It is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case.

In arriving at an equitable division of the marital estate, T.C.A. 36-4-121(c) instructs the trial court to consider all relevant factors, including the following:

> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;

> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
>
> (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
>
> (6) The value of the separate property of each party;
>
> (7) The estate of each party at the time of the marriage;
>
> (8) The economic circumstances of each party at the time the division of property is to become effective;
>
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
>
> (10) The amount of social security benefits available to each spouse; and
>
> (11) Such other factors as are necessary to consider the equities between the parties.

The trial court is not permitted to consider marital fault in equitably dividing the marital estate. T.C.A. § 36-4-121(a)(1).

Dividing the marital estate begins with a classification of the parties' property as either "marital" or "separate." ***Herrera v. Herrera***, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996); ***McClellan v. McClellan***, 873 S.W.2d 350, 351 (Tenn. Ct. App. 1993). The definitions for these two classifications can be found at T.C.A. § 36-4-121(b).

In general, marital property means "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce." T.C.A. § 36-4-121(b)(1)(A). On the other hand, separate property is generally defined as "[a]ll real and personal property owned by a spouse before marriage," T.C.A. § 36-4-121(b)(2)(A),

or "[p]roperty acquired by a spouse at any time by gift, bequest, devise or descent." T.C.A. § 36-4-121(b)(2)(D).

The trial court determined that the proceeds from the sale of real property located in Colombia, South America did not constitute marital funds but instead were funds belonging to Wife's daughter. The testimonial and documentary evidence at trial revealed that Wife owned a house in Colombia prior to marrying Husband. According to a requirement under Colombian law, which was designed to protect children from homelessness and provide them with educational funds, Wife transferred her interest in the property in 1993 to her daughter, who was a minor at the time. In 2004, the daughter gave her mother a power of attorney to sell the home so that the proceeds could be used to pay off her student loans. Wife then sold the real property in Colombia and received $14,000, which she in turn gave to her daughter.

Wife testified that she sent monthly payments to her family in Colombia for the mortgage on the house where her daughter lived. Wife did so both before and after she was married. Husband testified that Wife sent money to her family from their marital funds for the mortgage as well as for home improvements to the house in Colombia, and therefore he claims that he is entitled to an equitable division of the proceeds of this property. Wife denied that Husband made any financial contributions to the house in Colombia.

Again, the court did not find "most" of Husband's testimony credible, while it did find Wife to be quite credible. When we factor in the court's credibility determinations, we do not find that the evidence preponderates against the decision that the proceeds from the sale of the Colombian property were not subject to equitable distribution as marital property. Therefore, we affirm the court's judgment with regard to the classification of the Colombian property as belonging entirely to Wife's daughter.

C.

As a part of the division of the marital estate, the trial court should also allocate the parties' debt. ***Anderton***, 988 S.W.2d at 679. Marital debt has been defined as "all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing." ***Alford v. Alford***, 120 S.W.3d 810, 813 (Tenn. 2003). The parties' debt should be divided equitably in consideration of the factors listed in T.C.A. § 36-4-121(c). ***Kinard v. Kinard***, 986 S.W.2d 220, 233 (Tenn. Ct. App. 1998); *see also* ***Cutsinger v. Cutsinger***, 917 S.W.2d 238, 243 (Tenn. Ct. App. 1995).

Upon determining the parties' obligations that constitute marital debt, the trial court should also consider the following factors in making an equitable allocation of the debt: (1) the party who incurred the debt; (2) the debt's purpose; (3) the party who benefitted from the debt; and (4) the party who is in the better position to repay the debt. ***Alford***, 120 S.W.3d at 812-13 (citing ***Mondelli v.***

Howard, 780 S.W.2d 769, 773 (Tenn. Ct. App. 1989)).[4] Where possible, marital debts frequently follow their related assets. ***Kinard***, 986 S.W.2d at 233; ***King v. King***, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998).

In dividing the marital debt in this case, the court ordered that Husband would be responsible for paying two credit card bills, while Wife would pay the hospital bill incurred during the birth of the parties' child. Husband testified that the parties had a Navy Federal Credit Union credit card with a balance of $15,500 and a Capital One credit card with a balance of $5,500. Wife testified that the balance of the hospital bill for the birth of their son is a little over $3,000.

Husband admitted that he used both credit cards for his construction business, but he also claimed that the cards were used for household items for the marital home. However, Husband could not state with certainty how much of either balance was attributable to the marriage versus his business expenses. Husband readily agreed that he would assume the credit card debt with the greater balance of $15,500. With respect to the credit card with the balance of $5,500, Husband admitted that this card was in his name only and that his wife never used the card.

Based on the legal principles involving marital debt and given the admissions of Husband on this issue, we cannot find that the evidence preponderates against the court's decision to make Husband responsible for paying the two credit card bills. Accordingly, we affirm the court's judgment with regard to the allocation of the parties' marital debt.

D.

As a final matter in this section, we note that Husband filed a reply brief in which he included a "supplemental argument" that the trial court erred in finding the equity in the marital home to be merely $22,000. This matter was not presented in the issue section of Husband's initial brief, and therefore Wife did not have any opportunity to respond to the argument. Accordingly, we will not consider this issue. The failure of Husband to address this matter in his original brief constitutes a waiver of this issue. *See* ***Hawkins v. Hart***, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001).

VII.

A.

With respect to the alimony awards, Husband's contention is that Wife failed to show any need for either type of alimony because, according to Husband, their financial circumstances are

[4] It should be noted that the Supreme Court in ***Alford*** rejected the ***Mondelli*** analysis "to the extent that it requires a trial court to engage in a preliminary determination of whether debt incurred during a marriage is marital or separate based on a 'joint benefit' test." 120 S.W.3d at 813. The Court did not, however, reject the debt allocation factors set forth in ***Mondelli***.

virtually the same when considering all relevant statutory factors. Therefore, he asserts that the trial court erred in awarding alimony.

B.

Hard and fast rules for spousal support decisions do not exist. ***Anderton***, 988 S.W.2d at 682. Generally, trial courts "have the prerogative to determine the type of spousal support that best fits the circumstances of the case and may award several different types of support in the same case when the facts warrant it." ***Id.*** Tennessee law provides four different types of alimony that may be appropriate in combination or alone: "rehabilitative alimony, alimony in futuro, also known as periodic alimony, transitional alimony, or alimony in solido, also known as lump sum alimony." T.C.A. § 36-5-121(d)(1).

Decisions about spousal support require a careful balancing of the statutory factors and depend upon the unique facts of each case. ***Anderton***, 988 S.W.2d at 683. T.C.A. § 36-5-121(i) sets out the following list of relevant factors for the trial court to consider in determining whether alimony is appropriate, and if so, the nature, amount, length of term, and manner of payment:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
>
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
>
> (3) The duration of the marriage;
>
> (4) The age and mental condition of each party;
>
> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
>
> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
>
> (7) The separate assets of each party, both real and personal, tangible and intangible;
>
> (8) The provisions made with regard to the marital property, as defined in § 36-4-121;

> (9) The standard of living of the parties established during the marriage;
>
> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
>
> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
>
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

The "real need of the [disadvantaged] spouse seeking the support is the single most important factor . . . [and next] the courts most often consider the ability of the obligor spouse to provide support." ***Aaron***, 909 S.W.2d at 410 (citation omitted).

There is a statutory bias in favor of rehabilitative alimony. T.C.A. § 36-5-121(d)(2); *see also* ***Crabtree v. Crabtree***, 16 S.W.3d 356, 358 (Tenn. 2000). According to the statutory definition, "[t]o be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties." T.C.A. §§ 36-5-121(d)(2), (e)(1).

In this case, the court concluded, "Ms. Radebaugh gets rehabilitative alimony for her to finish her masters in the amount of $500 for 24 months." During Wife's testimony, her counsel asked, "Would you like to be awarded alimony of $500.00 a month for 24 months?" Wife answered in the affirmative. During Husband's cross examination of Wife, she testified that she was attending school.

The court gathered the details regarding Wife's need for alimony from her counsel's opening and closing statements. At the beginning of the trial, counsel explained:

> [Wife] is an employee now of the Metro School System, but she has a contract that provides if she does not complete her masters degree and get a teaching certificate within the next year that she will lose her job. So, while all of this has been going on, in addition to teaching full-time, she has been going to school at Tennessee State and getting her masters in teaching and her teaching certificate. She has completed one year, that cost her $5,000 in student loans, and s

> he has another year to go. That will cost her $5,000, and she will have to borrow that.

Counsel made a similar, but less detailed, statement at the conclusion of the trial. These statements on the subject of Wife's educational pursuits apparently were treated by the court and the parties as evidence. Accordingly, we will treat them in the same manner.

Wife submited an income and expense statement listing a $200 monthly obligation for a $5,211 school loan at "TSU."[5] Wife testified that her gross income from 2001 to 2004 was approximately $39,000. In 2005, Wife earned a gross income of approximately $33,500.

As we have previously stated in addressing the trial court's award of child support, the evidence regarding Husband's net income from self-employment is somewhat deficient. However, even if Husband's testimony on this subject were to be fully accredited – which as earlier noted, the trial court declined to do – we hold that this testimony, when coupled with the tax returns, establishes, at a minimum, the ability of Husband to pay Wife $500 per month in rehabilitative alimony for 24 months. By pursuing additional education, she is attempting to improve her station in life and her capacity to earn an income. She showed a need for rehabilitative alimony and Husband has the ability to meet this need.

When all of this evidence is considered, we cannot say that the evidence preponderates against the trial court's decision to award Wife rehabilitative alimony.

C.

In the present case, the trial court awarded Wife attorney's fees in the amount of $7,471.95 as alimony *in solido*. This Court summarized the law regarding the recovery of attorney's fees as alimony in the case of ***Eldridge v. Eldridge***, 137 S.W.3d 1, 24-25 (Tenn. Ct. App. 2002):

> In a divorce case, an award of attorney's fees is treated as an award of alimony *in solido*. ***Kinard v. Kinard***, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998); ***Herrera v. Herrera***, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996). Thus, when determining whether to award attorney's fees, the trial court is required to consider the same factors used when considering a request for alimony. ***Kincaid v. Kincaid***, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995). As with alimony, need is the critical factor to be considered by the court when deciding whether to award attorney's fees. ***Herrera***, 944 S.W.2d at 390. An award of attorney's fees is proper when one spouse is disadvantaged and does not have sufficient resources with which to pay attorney's fees. ***Id.*** The question of whether to award attorney's fees, and the amount thereof,

[5] Apparently, Tennessee State University.

> are largely left within the discretion of the trial court and will not be disturbed on appeal unless the trial court clearly abused that discretion. ***Aaron v. Aaron***, 909 S.W.2d 408, 411 (Tenn. 1995).

We find no error in this award.

VIII.

On remand, the trial court is directed to transfer this case to another judge to address the issues of the calculation of Husband's income and his child support obligation and such future issues, if any, as may be raised by the parties. We do this because of the trial court's intemperate remarks pertaining to Husband and his conduct. Both parties are entitled to a judge who can resolve their differences in a calm, unbiased, neutral manner. Justice requires nothing less.

IX.

We reverse the trial court's judgment with respect to Husband's visitation and decree the visitation set forth in the appendix to this opinion. We vacate the trial court's award of child support and remand for a new calculation of Husband's income and corresponding child support obligation, such calculations to be effective as of the date of entry of the judgment of divorce and brought forward to the current time. In all other respects, we affirm the judgment of the trial court. On remand, the trial court will transfer this case to a new judge who will hereafter handle all matters pertaining to this case. Exercising our discretion, we tax the costs on appeal one-half to the appellant, Jeffrey Todd Radebaugh, and one-half to the appellee, Doris Radebaugh.

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CHARLES D. SUSANO, JR., JUDGE